Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1076

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
DANIEL L. DUSTIN,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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In the
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OCTOBER TERM, 1977.

No. .

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

DANIEL L. DUSTIN,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the court below (App. B) is reported at Mass. Adv. Sh. (1977) 2302.

Jurisdiction.

The decision of the court below was entered on November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

I. Whether the decision of the Supreme Judicial Court affirming the order of a trial judge which allowed a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3)?

II. Whether the Supreme Judicial Court applied correct federal standards in requiring the exclusion from evidence of a defendant's statements even though the court found that they were voluntarily made, bore indicia of reliability and were found not to have been the product of any intentional violation of constitutional standards?

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

In April, 1976, the defendant was indicted for murder by a grand jury sitting in the County of Hampden, Massachusetts. Prior to trial, the defendant filed a motion to suppress statements made to a police officer while in custody. A judge of the Superior Court allowed the motion to suppress.

Pursuant to Massachusetts General Laws, c. 278, § 28E (App. A), the Commonwealth appealed to a Single Justice of the Supreme Judicial Court of the Commonwealth.

The Single Justice having determined "that the administration of justice would be facilitated thereby" allowed an interlocutory appeal from the decision of the Superior Court and reported the appeal to the Full Court for hearing.

On November 7, 1977, the Supreme Judicial Court affirmed the Superior Court, ruling "that the defendant did not make the voluntary and intelligent waiver of his constitutional rights required by controlling Federal precedent." *Commonwealth* v. *Dustin*, ____ Mass. ____ (1977), Mass.

Adv. Sh. 2302 (App. B). The court remanded the case to the Superior Court for further proceedings.

Statement of the Facts.

The trial court, following an evidentiary hearing on the motion to suppress, made findings of fact and rulings of law (App. C). Based upon those findings, the facts surrounding the statements in question may be summarized as follows:

On Saturday, April 17, 1976, an incident occurred at a bar in Holyoke, Massachusetts, which resulted in the death of Carlton Bausch. Later that day officers of the Holyoke police department went to the home of the defendant to execute a search an arrest warrant. The defendant was placed under arrest and read his *Miranda* rights from a card. The defendant indicated that he understood his rights and did not "wish to talk about it." The defendant was transported to a Holyoke police station, booked, and again read his *Miranda* warnings. He again indicated that he did not wish to make a statement. He was informed that he would have unlimited access to the telephone. He called his parents and was advised that they had secured an attorney. The attorney came to the station and conversed with the defendant for 10 to 15 minutes, and advised the defendant not to talk with anyone. The defendant was then put in a cell and informed by police that since Monday was a holiday, he would have to stay in jail two or three days awaiting arraignment.

Later that day the defendant made a telephone call to a friend who suggested he retain another attorney. Dustin then, by telephone, discharged his first attorney. At approximately 10 to 10:30 p.m. on Saturday the second

attorney arrived at the police station and advised the defendant of his rights and told him to say nothing to the police.

The officers sent out for any food which the defendant wanted, at his own expense, and allowed free access to the telephone, which he used several times. For security reasons, the defendant was observed around the clock by officers on a "watch" basis.

The trial judge found:

> "Except for the incident here in question, I find that the police engaged only in general, unrelated conversation with him, occasionally even playing cards." (App. C, p. 11a, *infra*.)

The specific findings of the trial judge on the incident in question are set out below:

> "On Sunday, April 18, 1977, Police Officer William Tallman was assigned to watch the defendant in his cell from 4:00 P.M. to 6:00 P.M. and 9:00 P.M. to midnight. At approximately 4:30 P.M. the defendant asked this officer, 'If I tell you something about the incident, will I be admitting my guilt?' (Tr. p. 38) The officer replied, 'You are not on the stand and you are not under oath. You can tell me anything you want to.' (Tr. p. 39) The defendant's response was that if the officer repeated what he was told, Dustin would say that he had lied. (Tr. p. 48)
>
> "The defendant then proceeded to admit what happened during the time period that Carlton Bausch was killed. It is this entire statement that is the subject of this Motion to Suppress.

"The defendant was frightened, confused and cried periodically while in the cell. He was arraigned on Tuesday, April 20, 1977.

"Officer Tallman testified that when the defendant made inquiry as to the ramifications of his statement, the *Miranda* warnings came to mind (Tr. p. 39) as having been studied in school, but he did not advise the defendant of any of his constitutional rights. There was no evidence that Officer Tallman's reply to the defendant's inquiry was prompted by evil motive, an intent to deceive, or could be categorized as an attempt to interrogate.

"After listening to the defendant's statement, Officer Tallman filed a report which contained the incriminating statements together with the initial inquiry by the defendant and his response." (App. C, pp. 11a-12a, *infra.*)

Reasons for Granting the Writ.

Introduction.

The petitioner argues the following reasons why this petition for writ of certiorari should be granted.

1. The issues raised by the petition are serious and fundamental to the further conduct of the case.

2. The decision of the court below is based upon an unwarranted expansion of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which is in conflict with other state and federal decisions.

3. The decision of the court below is based on an erroneous legal standard for determining the admissibility of a voluntary statement.

I. The Decision of the Supreme Judicial Court Constitutes a Final Judgment under 28 U.S.C. § 1257(3).

Mass. Gen. Laws c. 278, § 28E, provides for an interlocutory appeal by the Commonwealth or the defendant from an order of the Superior Court determining a motion to suppress evidence prior to trial, if the administration of justice would be facilitated thereby. The statute further provides that a Single Justice may hear the appeal or report it to the Full Bench. In the instant case, the matter was reported to the Full Bench for decision. Petitioner concedes that the posture of this case does not technically constitute a final judgment in the sense that in a criminal proceeding the final judgment is the sentence. *Berman* v. *United States*, 302 U.S. 211 (1937). However, the posture of the case is similar to *California* v. *Stewart*, 384 U.S. 436 (1966).

In *Stewart*, the California Supreme Court had ordered a retrial because the defendant's rights to counsel and to remain silent had been violated. This Court denied the defendant's motion to dismiss the writ of certiorari for lack of a final judgment, stating:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S 903." 384 U.S. at 498 n. 71.

In the instant case, the decision of the Full Bench is final in that the issue is not capable of further review regardless of the outcome of the trial.[1] The decision is conclusive of the issue and the people of the Commonwealth will have no opportunity for review. This result is anomalous in that, had the court ruled against the defendant, he would still have further opportunity for review should a conviction result. However, the Commonwealth will be denied any review of this substantial constitutional question if the order of the court is not reviewed on certiorari.

Petitioner acknowledges that this Court has held, in another context, that Congress did not intend that a federal district court's ruling on a motion to suppress be appealable to the Court of Appeals under 28 U.S.C. § 1291. *DiBella* v. *United States*, 369 U.S. 121 (1962). *Carroll* v. *United States*, 354 U.S. 394 (1957). However, the Commonwealth of Massachusetts has established a mechanism for appeal of such orders and in this case the highest court of the Commonwealth has decided the issue.

Petitioner suggests that the finality requirements of 28 U.S.C. § 1257(3) are satisfied where the highest court has ruled on a substantial constitutional issue. Moreover, an appeal under § 1291 is of right, while § 1257 involves a discretionary grant of review capable of more flexibility and easily limited to review of only those cases raising substantial and fundamental issues, as was demonstrated in *California* v. *Stewart*, *supra*.

Given that a mechanism for appeal exists, the judgment of nonadmissibility of statements made by a defendant falls into that category of cases covered by *Cohen* v. *Beneficial*

[1]The Supreme Judicial Court itself recognized this result and suggested application to the federal court for review. *Commonwealth* v. *Dustin*, *supra*, at 2307.

Industrial Loan Corp., 337 U.S. 541 (1949).[2] In *Cohen*, the Court recognized that there are some judgments which fall into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

In the instant case, the ultimate issue to be determined is the guilt or innocence of the defendant. The issue sought to be reviewed here (and only capable of review here and now) is whether certain evidence must be excluded from the trial of the ultimate issue.

Therefore, the Commonwealth urges this Court to apply to the instant case the ultimately practical and sensible interpretation of the finality requirements of § 1257(3) that it applied in *California* v. *Stewart*, *supra*.

II. The Court Below Improperly Extends Miranda v. Arizona, 384 U.S. 436 (1966), to Apply to a Situation in which No Custodial Interrogation Exists.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established certain prophylactic rules which must be followed prior to any custodial interrogation. Custodial interrogation was defined as "questioning initiated by law

[2]The reasoning of *Cohen* has been applied to criminal cases. *Stack* v. *Boyle*, 342 U.S. 1 (1951).

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In the instant case, the defendant, having been twice given the *Miranda* warnings by a police officer and twice told by his attorneys not to talk, initiated a conversation with an officer who was merely assigned to watch his cell. The court below, in fact, found "there was no 'interrogation' of the defendant such as would trigger *Miranda* v. *Arizona*, 384 U.S. 436 (1966)." *Dustin*, *supra*, at 2303.

Nonetheless, the court below adopts the position that in this situation the officer should have repeated the *Miranda* warnings. The court formulates a new standard that expands *Miranda* to require that a reiteration of warnings is necessary each time a defendant volunteers a statement regardless of whether an interrogation is occurring. *Miranda*, however, specifically disavows any such requirement. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding." *Miranda* at 478.

Contrary to the Supreme Judicial Court's position, the highest courts of other jurisdictions have refused to require *Miranda* warnings where a statement was volunteered. The Eighth Circuit has stated:

> "*Miranda* warnings are required only when statements are taken from a defendant in a 'custodial interrogation'. . . . Thus, statements which stem from interviews initiated by a defendant need not be preceded by the warnings required in *Miranda*." *United States* v. *Standing Soldier*, 538 F. 2d 196, 200 (1976).

Again, the Fifth Circuit has stated:

> "The *Miranda* rules do not forbid the admission into evidence of spontaneously volunteered confessions or statements by prisoners held in jail . . . simply because they happen, as prisoners, to be already in custody. The Supreme Court's stress was on interrogation, not on 'volunteered statements of any kind'." *United States* v. *Powers*, 444 F. 2d 260, 261 (1971).

Accord, *Holloway* v. *United States*, 495 F. 2d 835 (10th Cir. 1974); *People* v. *Tomita*, 66 Cal. Rptr. 739 (1968); *State* v. *Chabonian*, 185 N.W. 2d 289 (Wis. 1971); *State* v. *Taylor*, 343 A. 2d 11 (Me. 1975). Therefore, the Commonwealth submits that not only has the Supreme Judicial Court extended *Miranda* requirements to an area in which this Court has never held *Miranda* to apply, but it has done so in total conflict with other state and federal decisions.

A. *The Supreme Judicial Court Applies an Incorrect Standard for Determining a Knowing, Intelligent and Voluntary Waiver.*

Again, the Supreme Judicial Court rejects the argument that there was conduct "tantamount to interrogation" as in *Brewer* v. *Williams*, 430 U.S. 387, 399 n. 6 (1977), but then imposes the standard for determining voluntariness enunciated in *Miranda* and *Brewer*, regardless of the fact that there was no interrogation. The court below notes that the defendant had been informed of his right to counsel, that he appeared to understand it and that he was free to disregard the advice of two attorneys who had

advised him to remain silent. However, the court then proceeds to apply to the Commonwealth the rule that it bears a "heavy burden" to show a knowing and intelligent waiver. Relying upon *Brewer*, the court states:

> "'But waiver requires not merely comprehension but relinquishment,' and his conversation with the police officer does not support any suggestion that he waived the right; the officer did not tell him that he had a right to the presence of a lawyer, and 'made no effort at all to ascertain whether' he 'wished to relinquish that right.'" *Dustin, supra*, at 2306.

Petitioner submits that this standard is applicable only where there is an interrogation which results in the making of a statement. This Court was careful to note that the conduct in *Brewer* was tantamount to interrogation.[3] Interrogation is, petitioner submits, a necessary prerequisite for applying the waiver standard adopted by the court below and no decision of this or any court has applied such a standard to a non-interrogation situation.

B. *The Proper Inquiry is Whether the Defendant's Statements were Voluntary.*

Since the statements in this case were not offered during an interrogation, the proper test of their admissibility, as a constitutional matter, should be governed by a due process test of voluntariness. Under the circumstances present here,

[3]The Court both in the majority opinion and in Mr. Justice Powell's concurrence emphasized the fact that an interrogation was being conducted; that police officers intended to "obtain as much incriminating information as possible." 430 U.S. at 399, 411-413. No such conduct occurred in the instant case.

wherein *Miranda, supra*, does not apply, petitioner suggests that the appropriate test is that set forth in *Procunier* v. *Atchley*, 400 U.S. 446 (1971):

> "The question was whether the will of the defendant had been overborne so that the statement was not his free and voluntary act, and that question was to be resolved in light of the totality of the circumstances." 400 U.S. at 453.

The court continued,

> "Low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U.S. 346; *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Davis* v. *North Carolina, supra*." *Id.* at 453-454.

The defendant in the instant case was not a juvenile, did not appear to be of below-average intelligence, was repeatedly given the *Miranda* warnings, was told he would be held only a few days before arraignment, was not questioned after he indicated he did not wish to make a statement, had consulted with two attorneys, and had free access to a telephone. There were no abusive or coercive acts on the part of police officials which could possibly be viewed as overriding the will of the defendant.

The Supreme Judicial Court apparently regards the police officer's misstatement as the controlling factor on the issue

of involuntariness in Dustin's case. Yet, it can be argued that the prior warnings were given close enough to the time of the defendant's statements so as not to have lost their protective effect. Moreover, the defendant's response to the officer's statement indicated that he was aware that his statements could be used against him and he had already thought of a way to counteract any action by the officer. Indeed, even were the officer's response deemed deceptive, albeit innocent, the statements need not be deemed involuntary. *Frazier* v. *Cupp*, 394 U.S. 731 (1969). *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

Therefore, where there is no abusive or coercive police conduct, where the defendant has been previously given *Miranda* warnings, and where there is no interrogation, the Supreme Judicial Court has applied erroneous constitutional standards to require suppression of the statements in question. It has improperly extended *Miranda* requirements to a non-interrogational situation in conflict with other state and federal decisions cited above.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

Massachusetts General Laws, Chapter 278.

§ 28E. [Appeals by Commonwealth.]

An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all felony cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion to grant appropriate relief under the provisions of section forty-seven A of chapter two hundred and seventy-seven. On application for an appeal in a felony case by and on behalf of the commonwealth by the attorney general or a district attorney, or by the defendant, a single justice or the chief justice of the supreme judicial court may, upon determining that the administration of justice would be facilitated thereby, grant an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial and a single justice shall hear the same or shall report the same to the full court or to the appeals court for hearing; provided, that if such application is denied, or if such application is granted but the interlocutory appeal is heard by a single justice, the determination of the motion to suppress evidence shall be open to review by the full court after trial in the same manner and to the same extent as determinations of such motions not appealed under the interlocutory procedure herein authorized. An appeal shall be taken or an application for appeal shall be filed under this section within ten days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law. The appeal, or application and appeal if granted,

shall be diligently prosecuted, and trial shall be stayed pending prosecution and determination thereof.

If the appeal or application therefor is taken on behalf of the commonwealth the defendant shall be released on personal recognizance, and shall be reimbursed his costs of appeal together with reasonable attorneys' fees, subject to the approval of the court.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under sections thirty-three A through thirty-three G, inclusive.

Appendix B.

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* DANIEL L. DUSTIN.

Hampden. September 13, 1977. — November 7, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & WILKINS, JJ.

Admissions and Confessions. Constitutional Law, Admissions and confessions.

INDICTMENT found and returned in the Superior Court on April 22, 1976.

A motion to suppress evidence was heard by *Alberti,* J.

The Commonwealth's application for an interlocutory appeal was allowed by *Wilkins,* J., and the appeal was reported by him.

L. Jeffrey Meehan, Special Assistant District Attorney, for the Commonwealth.

William K. Danaher, Jr. (*John F. St. Clair* with him) for the defendant.

BRAUCHER, J. The defendant was indicted for murder in the first degree and for assault and battery with a dangerous weapon. A judge of the Superior Court allowed his motion to suppress statements made by him to a police officer while in custody, and a single justice of this court allowed an interlocutory appeal to this court by the Commonwealth pursuant to G. L. c. 278, § 28E. We uphold the judge's ruling that the defendant did not make the voluntary and intelligent waiver of his constitutional rights required by controlling Federal precedent.

1. *The judge's findings.* We summarize the judge's findings of fact, which are supported by the evidence. An incident about 1 A.M. on Saturday, April 17, 1976, resulted

in the death of the victim. The defendant was arrested about 7:30 P.M. the same day pursuant to an arrest warrant. He was given Miranda warnings twice that evening, and each time indicated that he understood his rights and did not wish to make a statement. Later the same evening he consulted with two attorneys, having retained the second after discharging the first. Both advised him not to talk to the police. Because Monday the 19th was a holiday, he was told that he would be in jail for two or three days awaiting arraignment.

About 4:30 P.M. on Sunday the 18th, the defendant asked the officer assigned to "watch" him, "If I tell you something about the incident, will I be admitting my guilt?" The officer replied, "You are not on the stand and you are not under oath. You can tell me anything you want to." The defendant said that if the officer repeated what he was told, the defendant would say he had lied. The defendant then made the statements now in issue.

The defendant was frightened and confused, and cried periodically. There was no evidence that the officer's reply to the defendant's inquiry was prompted by evil motive or an intent to deceive. There was no attempt to interrogate. But the defendant's question "clearly indicated that he was confused about the legal consequences of making a statement," and he "was effectively, though not intentionally, deceived by the officer's response."

The judge ruled that there was no "interrogation" of the defendant such as would trigger *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and that in the absence of interrogation there was no violation of the Sixth Amendment rights set forth in *Brewer* v. *Williams*, U.S. , (1977) [97 S. Ct. 1232, 1240]. But, he ruled, the defendant "did not make a voluntary and intelligent waiver of his fifth amendment rights." The officer's "deceptive statement" distinguished this case from *Commonwealth* v. *Frongillo*, 359 Mass. 132 (1971). Moreover, in the "novel situation" presented, "the officer should have given the *Miranda* warnings to the defendant."

2. *Voluntariness of the statements.* The Commonwealth vigorously asserts that the defendant's statements were voluntary, citing *Commonwealth* v. *Borodine*, Mass. , (1976) [Mass. Adv. Sh. (1976) 2153, 2159], cert. denied, 429 U.S. 1049 (1977), and *Commonwealth* v. *Sousa*, 350 Mass. 591, 598-599 (1966). See *Commonwealth* v. *Harris*, 364 Mass. 236, 241-242 (1973), and cases cited. We assume, without deciding, that the traditional test of voluntariness was met, and the statements would have been admissible in evidence before the decision in the *Miranda* case, notwithstanding the deceptive statement by the police officer. *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). They might also have been admissible if made to private persons rather than to police officers, if made by a defendant not in custody, or if offered only to impeach the credibility of the defendant as a witness. *Commonwealth* v. *Mahnke*, 368 Mass. , - , - (1975) [Mass. Adv. Sh. (1975) 2897, 2913-2916, 2943-2947], cert. denied, 425 U.S. 959 (1976). See *Garner* v. *United States*, 424 U.S. 648, 657-658 (1976).

3. *Waiver.* The *Miranda* decision requires that warnings be given prior to any questioning of a person in custody and that he be given a continuous opportunity to exercise his rights during any custodial interrogation. See *Commonwealth* v. *Mahnke*, 368 Mass. , (1975) [Mass. Adv. Sh. (1975) 2897, 2936], cert. denied, 425 U.S. 959 (1976); *Commonwealth* v. *McKenna*, 355 Mass. 313, 323-325 (1969). If interrogation continues and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained

or appointed counsel. . . . Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda* v. *Arizona*, 384 U.S. 436, 475-476 (1966).

The judge found that there was no such interrogation as to trigger the *Miranda* rule. We reject the defendant's argument that there was conduct "tantamount to interrogation" as in *Brewer* v. *Williams*, U.S. , n.6 (1977) [97 S. Ct. 1232, 1240 n.6]. But the defendant was in custody, and had been for more than twenty hours. He had been given Miranda warnings twice and each time had indicated that he wished to remain silent. "At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda* v. *Arizona*, 384 U.S. 436, 474 (1966). Nevertheless, subsequent statements may be admissible if his "right to cut off questioning" has been "scrupulously honored." *Michigan* v. *Mosley*, 423 U.S. 96, 103-104 (1975). See *United States* v. *Olof*, 527 F.2d 752, 754 (9th Cir. 1975). Here the defendant asked, in effect, whether if he made a statement it could be used against him. The police officer's response carried an implication that it could not be. This was directly contrary to the required Miranda warning that anything the defendant said could and would be used against him in court.

Moreover, the defendant had been visited by two attorneys while in custody, as the police knew; each had advised him to remain silent. He had been informed of his right to counsel and appeared to understand it, and he was free to disregard the advice of counsel. "But waiver requires not merely comprehension but relinquishment," and his conversation with the police officer does not support

any suggestion that he waived the right; the officer did not tell him that he had a right to the presence of a lawyer, and "made no effort at all to ascertain whether" he "wished to relinquish that right." See *Brewer* v. *Williams*, U.S. , - (1977) [97 S. Ct. 1232, 1242-1243].

In this context we apply the rule that the Commonwealth bears a "heavy burden" to show a knowing and intelligent waiver, notwithstanding the absence of interrogation. The intention to waive constitutional rights must be made clear, without implication, inveiglement or subtlety, as it was, for example, in *Commonwealth* v. *Frongillo*, 359 Mass. 132, 137 (1971). The judge who saw and heard the witnesses concluded that there was no voluntary and intelligent waiver, and we cannot say he was plainly wrong. See *Commonwealth* v. *Hosey*, 368 Mass. , - (1975) [Mass. Adv. Sh. (1975) 2732, 2741-2743]. Even an innocent misrepresentation of the Miranda rights of the defendant renders suspect a claim that he waived those rights. See *Commonwealth* v. *Jones*, 457 Pa. 423, 435 (1974). The statement of the police officer is not easily characterized as "scrupulously" honoring Miranda rights; it seems rather to be "heedless" of those rights. See *Commonwealth* v. *Mahnke*, 368 Mass. , (1975) [Mass. Adv. Sh. (1975) 2897, 2935], cert. denied, 425 U.S. 959 (1976).

The facts of this case do not fall squarely within the holding of any binding Federal precedent. But we think faithful adherence to the spirit of the Federal cases we have cited and quoted requires us to uphold the judge's decision. The result is to exclude the defendant's statements from evidence, even though they were voluntarily made, even though they bear indicia of reliability, and even though they are found not to have been the product of any intentional violation of constitutional standards. If that result

is thought undesirable, the remedy must be sought in a Federal forum. As to the jurisdiction of the Supreme Court to review such a case, see *Miranda* v. *Arizona*, 384 U.S. 436, 498 n.71 (1966).

The order of the judge allowing the motion to suppress evidence is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

COMMONWEALTH v. DANIEL L. DUSTIN.

Nos. 76-1645, 76-1646.

FINDINGS OF FACT AND RULINGS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS.

The defendant Daniel L. Dustin was indicted for first degree murder and assault and battery with a dangerous weapon. In relation to both these indictments, the defendant filed a Motion to Suppress a statement given by him to a police officer, together with any and all evidence obtained as a result of that statement on the grounds that his fifth, sixth and fourteenth amendment rights were violated. A full evidentiary hearing was conducted on this motion on April 19, 1977, and accordingly, I find the following facts.

Findings of Fact

On Saturday, April 17, 1976, at approximately 1:00 A.M., an incident occurred at The Pig's Ear, a bar in Holyoke, that resulted in the death of Carlton R. Bausch. On the same day, at approximately 7:30 P.M., Sergeant Stephen Donoghue of the Holyoke Police Department, together with several other officers, went to 6 Cycle Street, Westfield (the defendant's residence) in order to execute a search warrant for the premises and an arrest warrant for the defendant, both relating to the homicide earlier that day. Sergeant Donoghue, after informing the defendant of his identity and

purpose, placed the defendant under arrest and read to him his *Miranda* warnings from a card. The defendant affirmatively indicated that he understood his rights and did not "wish to talk about it." The other officers searched the premises, and by consent, the defendant's automobile. Nothing of consequence was found.

The defendant was first transported, in accordance with standard operating procedure, to the Westfield Police Station, and then to the Holyoke Sargent Street Station. Upon arrival in Holyoke, the defendant was booked by a Sergeant Neil and for the second time, read his *Miranda* warnings. Again, the defendant protested his innocence and indicated that he did not wish to make a statement.

Sergeant Donoghue informed the defendant that he would be afforded unlimited access to the telephone. The defendant called his parents who stated that they had retained Attorney Jerome Farrell, who later came to the station. Farrell and the defendant conversed for approximately 10-15 minutes, and Farrell advised the defendant not to talk to anyone. The defendant was then transported to the annex in the "old" police station and put in a cell. He was informed that because of the Monday Patriot's Day holiday, he would have to stay in jail for two or three days awaiting arraignment.

Dustin, somewhat later that day, used the phone to talk with a friend who suggested Attorney Paul Kokonowski (now deceased) to him. The defendant then called Attorney Farrell and discharged him. Attorney Kokonowski arrived at approximately 10:00-10:30 P.M. on Saturday and advised the defendant concerning his rights. He also informed him to say nothing to the police.

The physical condition of the defendant's cell was adequate except that he was not allowed to have a blanket for security reasons. The officers obliged the defendant by

sending out, at his own expense, for any food which he wanted and also allowed him free access to the phone which he used several times. Also for security reasons, the defendant was observed around the clock by police officers on a regular "watch" basis. Except for the incident here in question, I find that the police engaged only in general, unrelated conversation with him, occasionally even playing cards.

On Sunday, April 18, 1977, Police Officer William Tallman was assigned to watch the defendant in his cell from 4:00 P.M. to 6:00 P.M. and 9:00 P.M. to midnight. At approximately 4:30 P.M. the defendant asked this officer, "If I tell you something about the incident, will I be admitting my guilt?" (Tr. p. 38) The officer replied, "You are not on the stand and you are not under oath. You can tell me anything you want to." (Tr. p. 39) The defendant's response was that if the officer repeated what he was told, Dustin would say that he had lied. (Tr. p. 48)

The defendant then proceeded to admit what happened during the time period that Carlton Bausch was killed. It is this entire statement that is the subject of this Motion to Suppress.

The defendant was frightened, confused and cried periodically while in the cell. He was arraigned on Tuesday, April 20, 1977.

Officer Tallman testified that when the defendant made inquiry as to the ramifications of his statement, the *Miranda* warnings came to mind (Tr. p. 39) as having been studied in school, but he did not advise the defendant of any of his constitutional rights. There was no evidence that Officer Tallman's reply to the defendant's inquiry was prompted by evil motive, an intent to deceive, or could be categorized as an attempt to interrogate.

After listening to the defendant's statement, Officer Tallman filed a report which contained the incriminating statements together with the initial inquiry by the defendant and his response.

Rulings of Law

In accordance with the above findings of fact, I hereby rule that: (1) There was no "interrogation" of the defendant by Officer Tallman such as would trigger *Miranda v. Arizona*, 384 U.S. 436 (1966) and succeeding federal and Commonwealth cases modifying and interpreting the same.

The defendant was given his *Miranda* warnings twice. At both times he exercised his right to remain silent and all questioning ceased. Although approximately twenty-two hours had elapsed since the second set of warnings were given, there was no questioning initiated by the officer. Therefore the rule of *Miranda v. Arizona, supra*, is inapplicable. *Miranda v. Ariz., supra*, at 478; *Comm. v. Black*, 76 Mass. App. Ct. A.S. 926, 931; *Comm. v. Swenor*, 75 Mass. App. Ct. 239, 243; *Comm. v. Frongillo*, 359 Mass. 132, 135-36 (1971). *Compare Comm. v. Orton*, 76 Mass. App. Ct. A.S. 1051, 1054; *Michigan v. Mosley*, 423 U.S. 96, 101-13 (1975).

(2) There was no constitutional error in the police conduct throughout the arrest, booking and detention procedure except for the conduct of Officer Tallman. The error occurred and the complete thrust of these rulings is concentrated on the three-line conversation between the defendant and Officer Tallman (with the full awareness by the Court that it was initiated by the defendant).

The defendant Dustin did not make a voluntary and intelligent waiver of his fifth amendment rights. I hereby rule that he did not intentionally relinquish his right to

remain silent when he spoke to Officer Tallman. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The defendant was effectively, though not intentionally, deceived by the officer's response to his question concerning the ramifications of speaking to him about the incident. It really makes no difference whether the deceit was or was not intentional. The defendant believed that he was about to engage in a private conversation. This view is further enforced by the defendant's response to the officer's deception (that he would say that he lied if the conversation were repeated).

The circumstances do not amount to the type of voluntariness which would pass constitutional standards. *See Johnson v. Zerbst, supra*, at 464; *Brewer v. Williams*, 45 U.S.L.W. 4287, 4294 (Feb. 22, 1977). The defendant was not making a voluntary confestion. [sic] See *Brown v. Mississippi*, 297 U.S. 278 (1936); *Frazier* v. *Cupp*, 394 U.W. [sic] 731 (1969); *Lego v. Twomey*, 404 U.S. 477 (1972).

The case of *Commonwealth v. Frongillo*, 359 Mass. 132 (1971) is clearly distinguishable. In that case, the Court held that a statement given by the defendant after he was arrested and given his rights to a police officer passing through the cell block was admissible in evidence. *Id.* at 136. Unlike the case at bar, there was no conversation in *Frongillo* indicating that the defendant did not understand the import of making a statement. More importantly, the officer in *Frongillo* did not make a deceptive statement to the defendant. If in the case at bar, the officer had not responded at all to the defendant's question, the result would be different. It is the affirmative misrepresentation by Officer Tallman which distinguishes this matter from *Frongillo*.

In addition to my above ruling, due to the novel situation presented in this case, I feel that under these limited

circumstances the officer should have given the *Miranda* warnings to the defendant. Twenty-two hours had elapsed since the defendant was last advised of his rights. The question propounded by the defendant clearly indicated that he was confused about the legal consequences of making a statement. The officer should have explained his rights to him. This is the protection of individual rights that the constitution requires.

(3) The defendant's sixth amendment right to counsel was not violated because there was no interrogation of the defendant by Officer Tallman. (See previous discussion [sic] in first ruling.) The rule regarding sixth amendment rights, mostly recently set out in *Brewer v. Williams, supra,* at 4291, affords the right to counsel when a person is interrogated once adversary proceedings have begun.

In accordance with the above rulings, it is hereby ordered that defendant's Motion to Suppress be allowed.

/s/ Charles R. Alberti
Charles R. Alberti
Justice of the Superior Court

Entered: 4/29/77
Filed April 29, 1977.

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1076.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

DANIEL L. DUSTIN,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent in Opposition.

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Brief for Respondent in Opposition.

Opinion Below.

The opinion of the court below is reported at Mass. Adv. Sh. (1977) 2302 and is correctly set forth in Appendix B of the petition filed by the Commonwealth of Massachusetts.

Jurisdiction.

The decision of the court below was entered on November 7, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3). In this particular case the respondent suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. § 1257(3) because the judgment lacks prerequisite finality.

Questions Presented.

I. Whether the decision of the Supreme Judicial Court affirming the order of a trial judge who allowed a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3)?

II. Whether the Supreme Judicial Court applied correct federal standards in requiring the exclusion from evidence of a defendant's statements even though the court found that they were voluntarily made, bore indicia of reliability and were not the product of any intentional violation of constitutional standards?

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The petitioner's statement of the case describing the proceedings below adequately sets forth the chronology of the state court proceedings.

Statement of the Facts.

The facts of this case are stated fully in the decision of the Massachusetts Superior Court trial judge (Petitioner's Appendix ("Pet. App.") C, pages 9a through 14a) and the decision of the Massachusetts Supreme Judicial Court (Pet. App. B, page 3a through 8a), and are adequately summarized in the Commonwealth's petition at pages 4 through 6.

Reasons for Denying the Writ.

I. The Decision of the Supreme Judicial Court Lacks Prerequisite Finality and is Not a Final Judgment under 28 U.S.C. § 1257(3).

The government relies heavily on *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (1966), as the predicate for the issuance of a writ of certiorari in this case. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court summarized "at least four categories . . . in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The language of this Court in *California* v. *Stewart* explaining its reasons for granting certiorari, 384 U.S. at 498 n. 71, and this Court's reference to *Stewart* in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 481, suggests that the basis for granting certiorari was, in reality, the "collateral order" doctrine. Indeed, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was

cited in the *Cox* case at the conclusion of the Court's discussion of the *Stewart* category of cases.[1] The collateral order doctrine suggests that, in addition to the requirement that the appellate matter be separate from and collateral to the merits of the claims pursued in the litigation, the appellate matter must also be too important to be denied effective review. As indicated by the government in its petition, the appellate matter must fall into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

The foregoing statement of this Court was followed, however, by Mr. Justice Jackson's admonition that ". . . we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents *a serious and unsettled question.*" 337 U.S. at 547 (emphasis supplied). It would seem, then, that *Stewart* should not be read as giving finality to every interlocutory order of a state's highest court which is decisive against the government on a motion to suppress evidence.[2]

---

[1] The reference in *Cox* to *Cohen* most probably referred to that element of the collateral order doctrine that focuses on the lack of effective review after a completely final judgment. It would seem, however, that the *Cohen* requirement that the appellate matter must involve a "serious and unsettled question," 337 U.S. at 547, is alive and applicable to the question of finality.

[2] The petitioner concedes that the government can obtain no further review in the Supreme Judicial Court of Massachusetts regardless of the

DiBella v. *United States*, 369 U.S. 121 (1962), and *Carroll* v. *United States*, 354 U.S. 394 (1957), underscore this Court's historical reluctance to permit appeals from lower court rulings on motions to suppress. The thrust of these cases reveals a reluctance to permit such appeals in the absence of legislation granting clear and specific authority for the appeal. The mechanism established by the Commonwealth of Massachusetts does not require, as does its federal counterpart,[3] that the Attorney General or District Attorney, as the case may be, certify to the Superior Court judge or to the Single Justice of the Supreme Judicial Court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding. Under the Massachusetts interlocutory appeals statute, the government cannot secure a potentially "final judgment" unless the Single Justice reports the matter to the Full Court or to the Appeals Court. It is only when the Single Justice decides the appeal himself that the motion to suppress remains open for further review by the Full Court after trial in the same manner and to the same extent as if no application for interlocutory appeal had been filed. (In such a case double jeopardy would prevent a government appeal.)

The fact that a Single Justice of the Supreme Judicial Court can thwart any claim to finality by the government by deciding the motion to suppress himself suggests that the Massachusetts Legislature, in enacting the interlocutory

outcome of any future trial; but the Commonwealth has yet to concede that the allowance of the defendant's motion to suppress would be decisive of the government's case against the defendant. This concession should be made by the Commonwealth, it is submitted, at least to sustain the Commonwealth's contention that the questions presented in the petition are too important to be denied review.

[3] Criminal Appeals Act, 18 U.S.C. § 3731.

appeals statute, had no intention of providing for federal appellate review of interlocutory orders on motions to suppress.

The petition filed by the Commonwealth candidly admits on page 9 that "[t]he issue sought to be reviewed here (and only capable of review here and now) is *whether certain evidence must be excluded from the trial of the ultimate issue*" (emphasis supplied). This Court had occasion to comment on the reviewability of such an issue in the *DiBella* case:

> "Nor are the considerations against appealability made less compelling as to orders granting motions to suppress, by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case. *United States* v. *Pack*, 247 F. 2d 168 (C.A. 3d Cir. 1957); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (C.A. 9th Cir. 1958). As the Ninth Circuit said of this circumstance, the Government is no more disadvantaged than in the case of an adverse ruling on the evidence during trial. *United States* v. *Rosenwasser*, 145 F. 2d 1015, 1018 (1944). What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy, that denies the Government the right of appeal in criminal cases save as expressly authorized by statute. *United States* v. *Sanges*, 144 U.S. 310; *United States* v. *Dickinson*, 213 U.S. 92, 102-103; *Carroll* v. *United States*, 354 U.S. 394, 400-403 and n. 9-12. No such expression appears in 28 U.S.C. § 1291, and the Government's only right of appeal, given by the Criminal Appeals Act of 1907, 34 Stat. 1246, now 18 U.S.C. § 3731, is confined to narrowly defined situations not relevant to our problem. Allow-

ance of any further right must be sought from Congress and not this Court. *Carroll* v. *United States, supra,* 354 U.S., at 407-408." 369 U.S. at 130.

II. The Decision Below is Plainly Correct.

A. *The Lower Court's Decision is Wholly Consistent with the Principles of Miranda v. Arizona, 384 U.S. 436 (1966), and Post-Miranda Standards of Involuntariness.*

The decision of the Supreme Judicial Court, while not a paragon of clarity, correctly focused on the fact that the respondent was in custody and had been in custody for more than twenty hours when he asked, in effect, whether, if he made a statement, it could be used against him. The lower court correctly held that when the police officer's response carried an implication that the statement could not be used against the respondent, the principles enunciated in *Miranda* v. *Arizona,* 334 U.S. 436 (1966), were violated. (See Pet. App. B, page 6a.)

The lower court also held that even though the respondent had been informed of his right to counsel and appeared to understand it and was free to disregard the advice of counsel, a waiver of the respondent's right to counsel would nevertheless require not merely comprehension but relinquishment. The lower court held that: "In this context we apply the rule that the Commonwealth bears a 'heavy burden' to show a knowing and intelligent waiver, notwithstanding the absence of interrogation. The intention to waive constitutional rights must be made clear, without implication, inveiglement or subtlety, as it was, for example, in *Commonwealth* v. *Frongillo,* 359 Mass. 132,

137 (1971). The judge who saw and heard the witnesses concluded that there was no voluntary and intelligent waiver, and we cannot say he was plainly wrong. See *Commonwealth* v. *Hosey,* 368 Mass. , - (1975) [Mass. Adv. Sh. (1975) 2732, 2741-2743]. Even an innocent misrepresentation of the Miranda rights of the defendant renders suspect a claim that he waived those rights. See *Commonwealth* v. *Jones,* 457 Pa. 423, 435 (1974). The statement of the police officer is not easily characterized as 'scrupulously' honoring Miranda rights; it seems rather to be 'heedless' of those rights. See *Commonwealth* v. *Mahnke,* 368 Mass. , (1975)" (Pet. App. B, page 7a).

It hardly seems probable that this Court would permit the government to innocently misrepresent to a defendant, when he is placed in jail, that if he makes a statement it will not be used against him, and then permit the government to use an inculpatory statement made "voluntarily" twenty hours later. Similarly, it hardly seems probable that this Court would countenance the government placing a defendant in jail to await trial and then, twenty hours later, volunteering to him that if he made a statement it would not be used against him, and then receiving and using an inculpatory statement. The fact that the innocent misrepresentation is the answer to a defendant's question would appear to make the case for a *Miranda* violation stronger, not weaker. A question as to whether a statement can be used against the person asking the question implies that he does not know the answer or is in doubt as to the answer. The addition of a statement that if the police officer repeated the statement the defendant would lie is more indicative of mistrust of the police than it is of an awareness that the officer's answer was wrong.

In *Oregon* v. *Hass*, 420 U.S. 714, 714-715 (1975), this Court had occasion to deal with the following question:

> "When a suspect, who is in the custody of a state police officer, has been given full *Miranda* warnings and accepts them, and then later states that he would like to telephone a lawyer but is told that this cannot be done until the officer and the suspect reach the station, and the suspect then provides inculpatory information, is that information admissible in evidence solely for impeachment purposes after the suspect has taken the stand and testified contrarily to the inculpatory information, or is it inadmissible under the Fifth and Fourteenth Amendments?"

In deciding the foregoing question it was necessary for this Court to proceed upon the finding of the Oregon Supreme Court that the suspect's statement, though made without interrogation, was nevertheless obtained in violation of the principles set out in *Miranda* v. *Arizona*, 384 U.S. 436, 467-473 (1966).

The Court also found in *Hass* that even though the evidence was obtained in violation of *Miranda* principles it could still be used to impeach the defendant's contrary testimony at his trial as long as "the trustworthiness of the evidence satisfies legal standards." 420 U.S. at 722.

This Court went on to make the following observation in *Hass*, at page 723:

> "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose

> and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."

The balance struck in *Harris* v. *New York*, 401 U.S. 222 (1971), was that there was sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief. *Hass* suggests that traditional standards for determining voluntariness and trustworthiness rather than *Miranda* principles are better utilized in the determination of whether challenged statements are available for use *other* than in the prosecution's case in chief.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court had occasion to explicate the meaning of post-*Miranda* "voluntariness" by turning to a long line of cases previously decided by this Court in the process of determining whether confessions had been "voluntarily" given. The observation was made in *Schneckloth* that:

> "This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which

has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' *Culombe* v. *Connecticut*, *supra*, [367 U.S.] at 602." 412 U.S. at 225-226.

This Court went on to point out several illustrative cases wherein it concluded that in determining voluntariness this Court has "determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." *Id.* at 226.

Following the teachings of *Schneckloth* v. *Bustamonte*, the respondent suggests that the conversation between the respondent and his captor, Officer Tallman, constituted police activity likely to or expected to elicit a statement from the respondent and that, therefore, the deceitful and false nature of the officer's statement was a compelling factor in the respondent's decision to speak.

The psychological impact on the respondent of Officer Tallman's false statement that "You are not on the stand and you are not under oath. You can tell me anything you want to" had to create a false sense of security and become the motivating reason for the respondent's statement. In this context the respondent's statement was "involuntary" under *Miranda* principles and under post-*Miranda* notions of "involuntariness." *Miranda* v. *Arizona*, *supra*; *Schneckloth* v. *Bustamonte*, *supra*.

The *Miranda* decision indicates that any use of trick or deception will be viewed as a strong factor suggesting involuntariness. *Miranda* v. *Arizona*, 384 U.S. at 476. Under *Schneckloth* v. *Bustamonte* the post-*Miranda* test of voluntariness does not require automatic reversal where there has been deceit by the police, nor does the respondent make such a suggestion. It would seem, however, that an otherwise voluntary statement that is induced by a false and deceitful statement concerning a suspect's *Miranda* rights would cast an almost insurmountable burden on the police to justify its use. Even a valid waiver in the first instance would not validate a statement obtained by police misconduct occurring after such a waiver. See *Commonwealth* v. *McKenna*, 355 Mass. 313 (1969).

B. *The Lower Court's Decision is Consistent with and Supportable under the Principles Enunciated in Massiah v. United States and Brewer v. Williams.*

The lower court's decision is wholly consistent with and supportable by *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Brewer* v. *Williams*, 430 U.S. 387 (1977). The *Massiah* principle, which applies in state criminal cases by force of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), forbids the admission of statements made in any confrontation between law enforcement authorities and a defendant who neither has counsel nor explicitly waives counsel after the time of "initiation of adversary . . . proceedings" within the meaning of *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). Cf. *White* v. *Maryland*, 373 U.S. 59 (1963); *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968). In *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977), this Court had occasion to comment further on just when the right to counsel attaches and said:

"Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby* v. *Illinois, supra,* at 689. See *Powell* v. *Alabama,* [287 U.S. 45]; *Johnson* v. *Zerbst,* 304 U.S. 458; *Hamilton* v. *Alabama,* 368 U.S. 52; *Gideon* v. *Wainwright, supra*; *White* v. *Maryland,* 373 U.S. 59; *Massiah* v. *United States,* 377 U.S. 201; *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263; *Coleman* v. *Alabama, supra.*"

In the instant case the respondent had been formally charged and an arrest warrant had issued for his arrest (see Pet. App. C, pages 9a and 10a). He had been in police custody for twenty hours.

The respondent submits that his right to counsel had attached when he conversed with Officer Tallman because he was under arrest, had been booked and was incarcerated awaiting further proceedings. The trial judge found that when the respondent asked Officer Tallman the question: "If I tell you something about the incident, will I be admitting my guilt?" it "clearly indicated that he [the respondent] was confused about the legal consequences of making a statement" (Pet. App. C, pages 11a and 14a). The trial judge further found that when Officer Tallman answered this question by saying: "You are not on the stand and you are not under oath. You can tell me anything you want to," the respondent "was effectively, though not intentionally, deceived by the officer's response"

(Pet. App. C, pages 11a and 13a). All of these findings were affirmed by the Supreme Judicial Court (see Pet. App. B, pages 4a and 5a).

This Court's decision in *Brewer* v. *Williams,* 430 U.S. 387 (1977), indicates that *Massiah* has retained its original vitality.

It is true there must be interrogation to trigger the precepts enunciated in *Massiah.* Again, however, when the predicate for a statement is deceitful conduct by the government such conduct would seem to make *Massiah* applicable.

When Officer Tallman chose to answer the respondent's question, he took upon himself the burden of answering the respondent's question as truthfully and as correctly as possible, at least with respect to so much of the respondent's question as embraced *Miranda* rights. Officer Tallman testified that "when the defendant made inquiry as to the ramifications of his statement, the *Miranda* warnings came to mind . . . as having been studied in school, but he did not advise the defendant of any of his constitutional rights" (Pet. App. C, page 11a). What he did do was make an affirmative misrepresentation to the respondent which led the respondent to believe "that he was about to engage in a private conversation" (Pet. App. C, page 13a). This deceit, however innocent, prevented any valid waiver of the respondent's *Miranda* rights and preserved his protection under *Massiah*; and because the affirmative misrepresentation was the motivating factor for the respondent to speak, the *Massiah* principle deprives it of validity.

III. The Lower Court Decision can be Supported on the Ground that the Conduct of Officer Tallman was "Tantamount to Interrogation."

Officer Tallman's affirmative misrepresentation to the respondent was "tantamount to interrogation" and thus the

lower court's decision is in full accord with *Miranda*, *Massiah* and *Brewer*. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the government candidly conceded that the "Christian burial speech" was "tantamount to interrogation." 430 U.S. at 399 n. 6. In *Brewer* the Court seems to have applied both a subjective and an objective test to determine whether Det. Leaming had interrogated the defendant Williams. Detective Leaming admitted at the trial that he was hoping to get all the information he could before Williams got to Des Moines where his lawyer, McKnight, was waiting. 430 U.S. at 399. Counsel for the state conceded the question at oral argument, 430 U.S. at 399-400 n. 6; and this Court held that the state court clearly proceeded upon the hypothesis that the "Christian burial speech" had been tantamount to interrogation. *Id.* at 400.

No such candor on the part of the government exists in this case. The trial judge found that "[t]here was no 'interrogation' of the defendant by Officer Tallman such as would trigger *Miranda* v. *Arizona* . . ." (Pet. App. C, page 12a). The trial judge further found that the respondent was given his *Miranda* warnings twice and that at both times he exercised his right to remain silent and all questioning ceased; although twenty-two hours had elapsed since the second set of warnings there was no questioning initiated by the officer (see Pet. App. C, page 12a).

The Supreme Judicial Court of Massachusetts rejected the argument that Officer Tallman's conduct was "tantamount to interrogation" (see Pet. App. B, page 6a).

The findings of the trial judge and the Supreme Judicial Court seem to be based upon a literal reading of *Miranda* and *Massiah* and a tortured reading of the conversation between Officer Tallman and the respondent. Both *Miranda* and *Massiah* clearly require interrogation, and the

respondent readily concedes this issue. The lower court's tortured analysis of the conversation between the police officer and the respondent and its resultant conclusion that the respondent's statement was not the result of "interrogation" is a flaw in the lower court's decision.

The Supreme Judicial Court correctly held that the "intention to waive constitutional rights must be made clear, without implication, inveiglement or subtlety . . ." (Pet. App. B, page 7a). It failed, however, to apprehend the natural and probable result that one might expect to occur when a suspect in a custodial environment decides to waive his right to silence. It should be expected that he would then decide to speak or make a statement; and the most probable subject might well be matters having to do with his incarceration.

The respondent submits that the conversation between Officer Tallman and the respondent amounted to "constructive interrogation" and was, therefore, "tantamount to interrogation." *Brewer* v. *Williams, supra*, 430 U.S. at 400. The decision of the Supreme Judicial Court can thus be supported under the full panoply of rights afforded to a formally charged defendant in police custody under the principles enunciated in *Miranda* v. *Arizona* and *Massiah* v. *United States*.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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